

## **EXHIBIT 61**



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### **Alan Schwartz Expert Rebuttal Report**

February 1, 2024

Report prepared for Lipsius-BenHaim Law, LLP

RE: Kitchen Winners NY Inc. v. Rock Fintek LLC

#### **A. BACKGROUND**

I am Alan Schwartz, President of mdi Consultants, Inc., 55 Northern Blvd, Great Neck, NY 11021. mdi has been in business since 1978 providing FDA regulatory consulting services to the FDA regulated industries. Prior to working with mdi, I was employed by the US FDA as a supervisor of field investigations out of the NY District Office. I worked with the US FDA for a little over 6 years. In total, I have over 51 years of FDA regulatory experience assisting firms in understanding and complying with the FDA regulations including companies like medical gloves manufacturers.

I was retained by Lipsius-BenHaim Law, LLP, on behalf of Kitchen Winners NY Inc., Joseph Mendlowitz, and Adorama, Inc. (collectively, the "Defendants"), to assist with identifying a test laboratory to perform testing on the gloves at issue in the above-referenced matter, to analyze the results of those tests, and to draft a rebuttal report to reports prepared by Jason T. Poulton, Ph.D. of ARDL, dated December 18, 2023, and John H. Carson Jr., PH. D., on behalf of Rock Fintek LLC.

On or about April 7, 2021, Kitchen Winners NY Inc., on the one hand, and Rock Fintek LLC, on the other hand, entered into a Sales and Purchase Agreement ("SPA"). Pursuant to the SPA, the Defendants procured approximately 55-60 containers of gloves (amounting to approximately 1.7 million boxes of gloves). I have been informed that the gloves that Defendants procured were all manufactured under 2 different lot numbers – 202103010101 and T4. Approximately 80% of the gloves were manufactured under lot number 202103010101 and 20% under lot number T4.

On May 17, 2022, Kitchen Winners NY Inc. commenced an action against Rock Fintek LLC in the Supreme Court of the State of New York, County of New York, alleging causes of action sounding in breach of contract and unjust enrichment for Rock Fintek's failure to pay Kitchen Winners NY Inc. the full amount owed under the SPA. On June 22, 2022, Rock Fintek removed the case to U.S. District Court, Southern District of New York and on August 5, 2022, filed an amended counterclaim against Kitchen Winners NY Inc., as well as an amended third-party complaint against Adorama, Inc., Hershey Weiner, Joseph Mendlowitz, JNS Capital Holdings LLC, and Joel Stern, alleging, *inter alia*, that the gloves procured were "polyvinylchloride gloves ... rather than nitrile/NBR gloves..."

## **B. ARDL'S TESTING FOR ROCK FINTEK**

I have been provided with two expert reports concerning this matter – one report prepared by Jason T. Poulton, Ph.D. of ARDL, dated December 18, 2023, and the other prepared by John H. Carson Jr., PH. D.

According to Dr. Carson's expert report, the gloves at issue in this matter were delivered and stored in 11 different warehouses, owned and operated by Medline Industries. Of the 11 warehouses, Rock Fintek LLC sampled three warehouses containing the supposedly largest inventories of gloves. Dr. Carson contends that from each of those 3 warehouses, 30 pallets were randomly selected and an accessible box of gloves from each of those pallets was selected for testing.

Dr. Carson states that "specification standard ASTM D6319 calls for physical property testing to be performed in accordance with acceptance sampling standard ISO 2859-1, Sampling procedures for inspection by attributes—Part 1: Sampling schemes indexed by acceptance quality limit (AQL) for lot-by-lot inspection at quality level AQL (Acceptance Quality Limit) 4.0 under Special Inspection Level S-2." Under this sampling standard, Dr. Carson opines that Rock Fintek LLC should have tested: "3 warehouses X 30 pallets/warehouse X 13 gloves/pallets," *i.e.*, a total of 90 boxes of gloves and a total of 1,170 gloves, in order to "form[] an excellent basis for estimating the properties of the entire inventory of gloves."

However, a review of Dr. Poulton's expert report indicates that Rock Fintek LLC did not follow the sampling scheme suggested by Dr. Carson. Instead, Dr. Poulton states that "ARDL received 28 boxes (two boxes from 14 unique lots) of unopened gloves labeled 'Medcare'" and that "[o]ne box from each of the 14 unique lots was submitted for ... analytical tests ..." That is, according to Dr. Poulton, ARDL completely ignored the ISO 2859-1 sampling scheme and tested merely 14 boxes of gloves.

Furthermore, while Dr. Poulton's report says that "One box from each of the 14 unique lots was submitted for ... analytical tests," it is entirely unclear how many gloves from each of the lots were actually tested. Also, as stated above, the gloves procured by Defendants were manufactured under only 2 lot numbers. I can only speculate that the other lots referenced in Dr. Poulton's report submitted for testing are the lots for gloves that were procured by the other defendants in this action.



### **C. SGS TESTING BY THE DEFENDANTS**

I have been informed that the gloves at issue in this matter were stored at various warehouses owned and operated by Medline Industries and that Defendants visited several of those warehouses and obtained samples of some of the gloves being stored there. Defendants submitted some of the gloves they obtained for testing by SGS-IPS for qualitative Infrared Spectroscopy (IR) analysis to determine whether NBR/nitrile could be detected as a component of the gloves. Specifically, the Defendants submitted 40 samples of gloves (10 gloves from each of the 4 largest warehouses) to be tested by SGS-IPS. The gloves submitted for testing were taken by Defendants from the 4 warehouses and were labeled as follows:

- 7/17/23 40-26-C1
  - Middletown
  - 6/13/23 WH955ODD0300
  - 6/13/23 WH9251CC0200
- BOTH GRAYSLAKE***

SGS-IPS randomly selected three glove specimens from each sample for testing and analysis.

Defendants received a testing report from SGS-IPS dated November 29, 2023, concerning the gloves submitted for testing (the “SGS Report”). Attached hereto as Exhibit A is a true and correct copy of the SGS Report. The SGS Report confirmed that nitrile was detected in each of the gloves that were tested.

### **D. AKRON RUBBER DEVELOPMENT LABORATORY (ARDL) TESTING AND ANALYSIS**

On or about January 12, 2024, I received from Defendants a total of 150 gloves in varying sizes and from various warehouses for testing, analysis, and reporting, as follows:

- 80 of the gloves were taken from lot number 202103010101, 8 of which were randomly selected for testing and reporting.
- 20 of the gloves were taken from lot number T4, 2 of which were randomly selected for testing and reporting.
- 50 of the gloves were taken from various lot numbers (QDMD01202002, T202104, MEDCARE202103, MED202011, and MED202102), 5 of which were randomly selected for testing and reporting.

I sent the gloves to Akron Rubber Development Laboratory, Inc. (“ARDL”) to be tested. This lab was selected based on the following qualifications: ARDL is an A2LA ISO 17025:2017 accredited, ISO 9001:2015 registered, ISO 13485:2016 registered and FDA compliant independent testing laboratory specializing in rubber, plastic and latex. The gloves were shipped to the ARDL laboratory’s facility at:

2887 Gilchrist Rd

Akron, OH 44305

ARDL performed an identity test to determine whether or not the gloves contain nitrile. The Polymer Identification test completed on the gloves followed ASTM D 3677 international standard titled "Standard Test Methods for Rubber—Identification by Infrared Spectrophotometry". These test methods cover rubber identification and are based on infrared examination of pyrolysis products (pyrolyzates) and films.

The test method parameters were as follows:

Instrument:	Perkin Elmer Frontier Spectrometer
Resolution:	4.0
Number of Scans:	6
Method of Preparation:	Film, Pyrolysis


Results for all tested samples:

Samples:	Polymer
Nitrile Gloves:	Acrylonitrile Butadiene Rubber

Having reviewed ARDL's report dated January 26, 2024 (the "ARDL Report"), and the findings contained therein, it is my conclusion that the glove samples I sent to ARDL for testing are nitrile gloves. Attached hereto as Exhibit B is a true and correct copy of the ARDL Report.

The above report represents my professional opinions, all of which are stated with a reasonable degree of professional certainty.

Prepared by:

  
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